STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER DAVID TYKOCKI,

Plaintiff-Appellant,

V

KIMIE KAY TYKOCKI,

Defendant-Appellee.

UNPUBLISHED
September 19, 2006

No. 266885
Genesee Circuit Court
LC No. 03-250695-DM

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce and a post-judgment order modifying parenting time and child support. Because the trial court did not err in failing to order defendant to have supervised parenting time with the minor children but did err in its determination of child support, we affirm in part and reverse in part and remand.

After a lengthy bench trial, the parties were divorced through entry of a judgment of divorce on June 30, 2005. Relevant to the instant appeal, the judgment provided the parties with joint legal and physical custody of their two minor children and required plaintiff to pay child support in the amount of $1429.35 per month, based upon the shared economic responsibility formula. Plaintiff thereafter moved for reconsideration and the trial court ultimately heard additional testimony from the parties' children concerning defendant's alcohol use. Based primarily upon the additional testimony, the trial court entered an opinion and order awarding plaintiff physical custody of the minor children and granting defendant parenting time. The trial court also ordered plaintiff to pay child support in the amount of $626 per month (again using the shared economic responsibility formula) but deviated from the formula due to defendant's income, awarding defendant an additional $200.00 per month in child support.

Plaintiff first asserts on appeal that the trial court erred in failing to require defendant to have supervised parenting time with the minor children, due to her history of substance and alcohol abuse. "To expedite the resolution of a child custody dispute by prompt and final adjudication, all custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005), citing MCL 722.28 and *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003). "'Questions of law are reviewed for clear legal error.'" *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (citations omitted).

Parenting time is not simply a parental right, but also a right of a child and, hence, an obligation of the parent. *Delamielleure v Belote*, 267 Mich App 337, 340; 704 NW2d 746 (2005). Disputes pertaining to parenting time are governed by the Child Custody Act, MCL 722.21 *et seq.* *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). Under the Child Custody Act, parenting time shall be granted in accordance with the best interests of the child and it is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. MCL 722.27a(1). However, such a presumption can be overcome by clear and convincing evidence on the record that it would endanger the child's physical, mental or emotional health. MCL 722.27a(3); *Rozek v Rozek*, 203 Mich App 193, 194; 511 NW2d 693 (1993).

Here, plaintiff asserts the trial court failed to given sufficient weight or consideration to defendant's history of substance and alcohol abuse in its determination of the best interest factors. The law in Michigan is clear - a trial court is not required to weigh each of the best interest factors equally, but rather, is permitted to give each factor, including the reasonable preference of the minor child, the weight appropriate for the circumstances presented. *McCain v McCain*, 229 Mich App 123; 580 NW2d 485 (1998). However, the trial court concurred with plaintiff's assertion based on its subsequent acknowledgement when ruling on plaintiff's motion for reconsideration:

> The Court concludes that Defendant's drinking problem/sobriety is of greater concern than previously thought and that it should be given greater weight in the overall best interest analysis.

As a result, the trial court altered custody and the parenting time schedule in favor of plaintiff. Neither plaintiff nor defendant is contesting the alteration of custody or the parenting time schedule. Rather, plaintiff asserts that the trial court should have gone one step further in protecting the minor children from defendant's ongoing substance abuse by requiring supervised parenting time.

The trial court indicated its concern with defendant's ability to maintain her sobriety and the potential risks to the minor children by specifically indicating that the change in custody and parenting time was designed to provide "more control and oversight by Plaintiff" and to place "Plaintiff in a better position to monitor sobriety so that he can seek court intervention as necessary to protect the children." However, the trial court was also required to balance the interests of the minor children in maintaining their relationship with defendant. MCL 722.27a(1).

Throughout the proceedings, the minor children expressed concern with being separated from either parent during the prior one-week on/one-week off parenting schedule. In addition, plaintiff does not dispute the trial court's determination that the parties are equal on MCL 722.23(a). Hence, in addressing the emotional and physical well being of the minor children the trial court determined it was in their best interest to have maximum contact with defendant, under sufficiently controlled circumstances, as a fail safe to protect the minor children from defendant's failure to maintain her sobriety. This is particularly true given the trial court's observation and concern that the minor children were already inordinately focused and sensitive to defendant's recovery and potential for relapse.

As such, it is reasonable that the trial court would seek to maximize the time the minor children have with defendant, with appropriate provisions to monitor potential risks involving defendant's failure to maintain sobriety, while not adding to the acknowledged stress and emphasis placed on defendant's tenuous recovery through the imposition of supervised parenting time. Notably, the trial court did not preclude the future possibility of supervised parenting time, should the need be demonstrated. While defendant's sobriety is a concern, plaintiff has not demonstrated that it has completely or substantially impaired her ability to parent the minor children when in her custody, necessitating the imposition of restrictions or conditions on parenting time as delineated in MCL 722.27a(8). Additionally, while evidence existed that defendant continued to consume alcohol, neither of the children suggested or implied that defendant was incapable of meeting their needs during her parenting time.

The best interests of the children are the key consideration when granting parenting time. Because a strong relationship between the children and both parents is presumed to be in the children's best interests, parenting time is granted "in a frequency, duration, and type reasonably calculated to promote" the same. MCL 722.27a(1). The trial court appropriately addressed the best interest factors, giving them their appropriate weight, and as such, the trial court did not err in failing to grant supervised parenting time.

Plaintiff next asserts the trial court erred in applying the shared economic responsibility formula ("SERF") in the calculation of child support. This Court reviews modification of child support orders for a clear abuse of discretion. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). In addition, whether defendant is entitled to application of the shared economic responsibility formula is a question of law that is reviewed de novo. *Gehrke v Gehrke*, 266 Mich App 391, 395; 702 NW2d 617 (2005).

A trial court may modify a child support order "as the circumstances of the parents, and the benefit of the children require." MCL 552.17(1). A child support order must, however, be based on application of the child support formula as developed by the Friend of the Court and in accordance with legislative mandate. MCL 552.519(3)(vi); *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998).

The Michigan Child Support Formula Manual ("MCSF") contains the Shared Economic Responsibility Formula ("SERF") to be used in situations where the noncustodial parent will spend "substantial amounts of time" with the children. 2004 MCSF 3.05; *Eddie v Eddie*, 201 Mich App 509, 513-514; 506 NW2d 591 (1993). Based on the number of overnight visits defendant is entitled to in accordance with the revised parenting time schedule, defendant qualifies to have the child support obligation calculated in accordance with the SERF.

Although it would have been beneficial for the trial court to specifically delineate the exact parenting time schedule, including the referenced holiday and school break schedule used by the Friend of the Court, a conservative calculation of defendant's overnights with the minor children confirms the applicability of the SERF based on the minimum 128 overnight periods required for its application. Defendant is awarded three weekends each month during the school year, which comprises approximately 42 weeks. Each weekend consists of three overnights (Friday through Monday), resulting in defendant having at least 90 overnight periods with the minor children. In addition, defendant receives alternating weeks with the minor children during the summer, which comprises approximately one-half of the ten-week summer vacation period,

and results in an additional 35 parenting time overnights. As a result, defendant receives 125 overnights of parenting time, not including holidays or other school breaks, which the trial court indicated would be alternated and shared. Even assuming that holidays will take precedence over routine parenting time, defendant receives a minimum of 128 overnights of parenting time with the minor children, thus, meeting the requirements for imposition of the SERF.

Finally, plaintiff contends the trial court improperly deviated from the child support guidelines based on income disparity between the parties. Modification of a child support order is a matter within the trial court's discretion. *Burba, supra,* p 647 (citation omitted). This Court reviews the trial court's decision for an abuse of discretion. *Id.* Whether a trial court operating within the statutory framework may properly consider income disparity as a basis to depart from the amount determined by application of the child support formula is a question of law that is reviewed de novo. *Burba, supra,* p 647 (citation omitted).

Plaintiff contends the trial court erred in deviating from the child support guidelines when it ordered him to pay an additional $200 a month in child support. In determining the contributions to support that parties must make, the trial court must generally follow the Friend of the Court formula. MCL 552.605(2); *Shinkle v Shinkle (On Rehearing),* 255 Mich App 221, 225; 663 NW2d 481 (2003). The assessment of support and the support formula are based on the needs and circumstances of the child and each parent's ability to pay. *Id.* A court can deviate from the support formula only if application of the formula is determined to be unjust or inappropriate. MCL 552.605; *Ghidotti, supra,* p 196. The court must specify in writing or on the record all of the following: (1) the support amount determined by application of the child support formula; (2) how the support order deviates from the child support formula; (3) the value of property or other support awarded instead of the payment of child support, if applicable; and (4) the reasons why application of the child support formula would be unjust or inappropriate. MCL 552.605(2); *Ghidotti, supra,* p 196.

The *Burba* Court previously determined that the existence of a disparity in income between parties did not render application of the child support formula unjust or inappropriate so as to justify deviating from the formula. *Burba, supra,* p 646. The *Burba* Court noted that the incomes of the parties "are accounted for when child support levels are set." *Id.* at 648. The Court further opined:

> An interpretation of [MCL 552.17; MSA 25.97][1] that considers income disparity as a factor rendering the formula unjust or inappropriate, justifying deviation from the formula, is repugnant to the Legislature's intent that income be dealt with as it is dealt with by the formula. Further, a 'double-dipping' into income would occur were income disparity an appropriate basis for deviating from the formula because income would be a factor when the support level was initially set by the

[1] In *Burba,* the Court cites to MCL 552.17 as the applicable statute. *Burba, supra,* p 647. Currently, the applicable statute, using the identical language in the relevant sections, is now contained at MCL 552.605.

> formula, and then again when a court deviates from the formula because of income. [*Id.* at 648-649 (footnote added).]

Here, the trial court relied on the income disparity between the parties for deviation from the child support formula, stating "Plaintiff has considerable income and Defendant remains unemployed. . .Absent additional child support Defendant would be unable to provide adequately for the children while they are in her care. Therefore the Court will deviate from the formula by awarding Defendant an additional $200.00 per month." As noted by the Michigan Supreme Court, this is a "legally improper" reason for deviating from the formula. *Id.* at 649. The decision of the trial court to deviate from the child support formula was thus an abuse of discretion.

We affirm the trial court's order regarding parenting time and the application of the shared economic responsibility formula and reverse the trial court's deviation from the child support guidelines and remand for further proceeding consistent with this opinion.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto